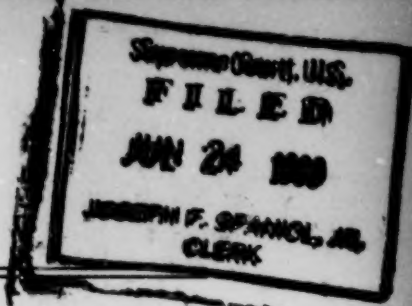


89-127

No.



**In The Supreme Court**  
of the  
United States

—  
OCTOBER TERM, 1989  
—

PHILIP RANDY CASTIGLIONE,  
*PETITIONER*

VS.

UNITED STATES OF AMERICA,  
*RESPONDENT.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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39 pgs.



## QUESTIONS PRESENTED

The first question is whether a trial court can refuse to dismiss "identical"<sup>1</sup> counts contained in the original and pending superseding indictments when the government requests and the trial court grants the government's motion to dismiss with prejudice all the counts contained in the original indictment without violating the double jeopardy clause of the Fifth Amendment and the principles of res judicata and collateral estoppel.

The second question is whether the government can obtain relief from a properly entered and non-appealed judgment dismissing with prejudice an indictment through the use of United States v. Scott, 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978) and United States v. Martin Linen Supply Company, 430 U.S. 564, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977), and ignoring the principles of res judicata and collateral estoppel as animated by the double jeopardy provision of the Fifth Amendment.

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<sup>1</sup> Although the superseding indictment contained five counts of the same alleged violations of Title 18 that were contained in the original indictment, there were less factual allegations set forth in the five counts in the superseding indictment than there were in the original indictment. In other words, in counts five through eight of the superseding indictment, the government deleted two of the three original factual allegations that were contained in the same alleged statutory violations in the original indictment, as set forth in counts 18, 21, 80 and 108 respectively. In count nine of the superseding indictment, the government deleted numerous overt acts that were alleged in count one of the original indictment. This is Petitioner's understanding of "identical" counts.

The third question is whether a distinction should be maintained between 28 U.S.C. Federal Rules of Criminal Procedure, Rule 48(a) (dismissal without prejudice) and 28 U.S.C. Federal Rules of Criminal Procedure, Rule 48(b) (dismissal with prejudice). It is suggested that the instant decision would delete if not blur the distinction intended between the two subsections of 28 U.S.C. F.R.Crim.P., Rule 48.

#### LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Philip Randy Castiglione, as represented by Nuttall, Berman & Magill by Timothy V. Magill and Jackson, Hargrove, Hillson & Emerich by David R. Emerich and Respondent, the United States of America, as represented by Robert E. Lindsay, Esq. and Gail Brodfuehrer, Esq. The government was represented before the trial court by Thomas R. Fink, Esq. Defendants Dadian and Guerrero were severed from this indictment. Defendant Dadian is represented by John Misseralian, Esq. Defendant Guerrero is represented by John Smurr, Esq. of Smurr & Henry.

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SUPREME COURT  
OF THE  
UNITED STATES

OCTOBER TERM, 1989

PHILIP RANDY CASTIGLIONE,  
PETITIONER,  
VS.  
UNITED STATES OF AMERICA,  
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEAL,  
FOR THE NINTH CIRCUIT

The questions presented merit review because the instant decision will have dilatorious and disastrous effects on the certainty of finality in criminal actions.

The instant decision is a violation of Petitioner's fundamental Fifth Amendment right against double jeopardy as triggered by the res judicata and collateral estoppel doctrines. The instant decision provides a tortuous and unusual definition of the meaning "Dismissal With Prejudice". Finally, the instant decision substantially affects a rule of national application in which there is an overriding need for national uniformity.

Petitioner Philip Randy Castiglione respectfully prays that a Writ of Certiorari issue to review the judgment and the opinion of the United States Court of Appeals for the Ninth Circuit entered as amended in the above-entitled proceeding on May 23, 1989.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, reported at 860 F. 2d 351 (9th Cir. 1988), has been depublished. The Memorandum of Decision of the United States Court of Appeals for the Ninth Circuit, as amended May 23, 1989, has not been reported at the time of filing the instant petition. Both opinions are reprinted in the appendix hereto, Page 1a, through 12a, *infra*.

## JURISDICTION

Petitioner was indicted on June 13, 1985 in the United States District Court for the Eastern District of California on 33 alleged violations of 18 U.S.C. Section 287, one alleged violation of 18 U.S.C. Section 371, one alleged violation of 18 U.S.C. Section 658, 73 alleged violations of 18 U.S.C. Section 1001, and 13 alleged violations of 18 U.S.C. Section 1341. On June 30, 1986, in a superseding indictment, petitioner was arraigned on two alleged violations of 26 U.S.C. Section 7201, two alleged violations of 26 U.S.C. Section 7206(1); four alleged violations of 18 U.S.C. Section 287, and one alleged violation of 18 U.S.C. Section 371. After repeated government attempts to dismiss the original indictment without prejudice the trial court granted the government's motion to dismiss with prejudice. Nine (9) months later, Petitioner moved to dismiss identical charges in the superseding indictment which was denied by the trial court.

Petitioner timely appealed the trial court's decision.

The Ninth Circuit Court of Appeals assumed jurisdiction for the appeal relying on the collateral order exception to 28 U.S.C. Section 1291 ("final judgment rule") as prescribed by Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1628 (1949) and Abney v. United States, 431 U.S. 651, 658, 97 S.Ct. 2034, 2039, 52 L.Ed.2d 651, 658 (1977). The Ninth Circuit, further, assumed jurisdiction on the grounds that petitioner had raised a

colorable claim regarding double jeopardy. The Ninth Circuit affirmed the trial court's decision. Petitioner timely requested a rehearing and hearing en banc, pursuant to Federal Rules of Appellate Procedure, Rule 35 and Rule 40(a). The Ninth Circuit denied the rehearing and hearing en banc filing an amended decision on May 23, 1989. Petitioner timely moved for a stay of mandate under 28 U.S.C. Federal Rules of Appellate Procedure, Rule 41(b) and petitions for review of the Ninth Circuit decision under 28 U.S.C. Section 1254(1).

### CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part that,

... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...

## STATEMENT OF THE CASE

On June 15, 1985, a 121 count indictment was filed against defendants Castiglione, Dadian, and Guerrero. Defendants Dadian and Guerrero were subsequently severed from this indictment. On January 2, 1986 petitioner requested and was granted a trial date for March 18, 1986. On March 3, 1986, at the government's request, the trial date was reset for April 22, 1986 which was eventually reset again at the government's request to July 1, 1986. On May 28, 1986 the government filed a motion to dismiss 92 counts from the 121 count indictment without prejudice. On June 4, 1986 petitioner Castiglione filed an opposition to the government's motion to dismiss the 92 counts without prejudice requesting the dismissal be entered with prejudice. On June 6, 1986 the government modified their motion to dismiss without prejudice to include the entire 121 count original indictment. Petitioner reopposed the dismissal of the entire indictment without prejudice again requesting entry of a dismissal with prejudice. The Court refused to dismiss without prejudice either the entire indictment or some of the 121 counts and maintained the third trial date for July 1, 1986. On June 26, 1986 the superseding indictment was filed with petitioner being arraigned on June 30, 1986. At the arraignment the government again asked the court to dismiss the entire original indictment without prejudice. The Court denied this request indicating that the government should go to trial and ordered the original indictment to be set for trial two weeks hence. After the setting of the fourth trial date, the government orally moved for dismissal of the original indictment with prejudice. The Court granted said motion, entering a written judgment dismissing the original indictment with prejudice on July 1, 1986.

Nine (9) months later, Petitioner filed a motion to dismiss counts five through nine of the superseding indictment based on double jeopardy as triggered by the doctrines of res judicata, and collateral estoppel arguing that since those counts were identical to counts contained in the

original indictment, the dismissal with prejudice constituted a final adjudication barring reprosecution. The trial court denied the motion holding that jeopardy had not attached. The trial court also denied Petitioner's motion for reconsideration. Petitioner timely appealed this denial to the Ninth Circuit Court of Appeals. The Ninth Circuit Court ultimately affirmed the trial court's decision. On May 26, 1989 Petitioner filed a motion for stay of the issuance of the mandate, in order to petition this Court for review.

## REASONS FOR GRANTING THE WRIT

### I

#### THE INSTANT DECISION IS UNCONSTITUTIONAL

The lower Court's decision is in violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution. (United States Const. Amend. V.) The ancient concept of prohibition against double jeopardy is deeply ingrained in the Anglo-American system of jurisprudence. United States vs. Wilson, 420 U.S. 332, 340, 95 S.Ct. 1013, 1020 (1975), 43 L.Ed.2d 232, 239; Benton vs. Maryland, 395 U.S. 784, 796, 89 S. Ct. 2056, 2063, 23 L.Ed.2d 707, 716, (1969); see also, J.Sigler, "A History Of Double Jeopardy," American Journal of Legal History, (1969), p.283.

The government has attempted to subvert this ancient doctrine, even though they requested the dismissal, "with prejudice", by asserting that the "with prejudice" dismissal was merely a mislabeling of the trial judge's intent. At this delicate and extremely important juncture of our legal system, such an error cannot be supported. (Rodriguez v. Gudeman, 794 F.2d 1458, 1460 (9th Cir. 1986); United States v. DiFrancisco, 449 U.S. 117, 130, 101 S.Ct. 426, 433, 66 L.Ed.2d 328, 341 (1980); Sanabria v. United States, 437 U.S. 54, 64, 98 S.Ct. 2170, 2178, 57 L.Ed.2d 43, 54 (1978). A dismissal with prejudice should not be allowed to violate the fundamental right of double jeopardy.



The bar of reprosecution on a prior prosecuted charge is further prohibited by the doctrines of res judicata and collateral estoppel, contained in the doctrine of double jeopardy. United States v. Oppenheimer, 242 U.S. 85, 87, 37 S.Ct. 68, 69, 61 L.Ed. 161, 164 (1916); Ashe v. Swenson, 397 U.S. 436, 442, 90 S.Ct. 1189, 1193, 25 L.Ed.2d 469, 475, (1970); United States v. Cejas, 817 F.2d 595, 598, (9th Cir. 1987). Unquestionably, authority and tradition clearly prohibits any attempt to recharge a defendant on a past resolved charge or claim.

The instant decision is in violation of Petitioner's constitutional right to a speedy trial. (United States Const., Amend. VI), 28 U.S.C. Federal Rules of Criminal Procedure, Rule 48(b) implements Petitioner's constitutional right to a speedy trial. (See, Moore's Federal Rules of Criminal Procedure, 2d Ed., Section 48.03[2], p. 48-25; and Schneider, The Right To A Speedy Trial, 20 Stan. L. Rev. 476, (1968).

A dismissal under 28 U.S.C. Federal Rules of Criminal Procedure, Rule 48(b) operates to allow a pre-trial dismissal of a prosecution where there is unnecessary delay in presenting the charges against a defendant, United States v. Marion, 404 U.S. 307, 319, 92 S.Ct. 453, 463, 30 L.Ed.2d 468, 478 (1971). Petitioner was prepared for trial at each of his four (4) trial dates. Each time the government refused to prosecute. This extended form of pre-trial delay has unduly caused petitioner to expend great time, money and valuable resources in preparation for each trial date. Case law clearly prohibits such prosecutorial harrassment. Crist v. Bretz, 437 U.S. 28, 35, 98 S.Ct. 2156, 2160, 57 L.Ed.2d 24, 31 (1978).

## II

IF ALLOWED TO STAND THE INSTANT DECISION  
WILL HAVE A PROFOUND AND ADVERSE EFFECT ON  
AMERICAN JURISPRUDENCE

This decision will undermine the concept of finality in any future legal proceeding, whether civil or criminal. The



term "Dismissal" came into use during the feudal period of development of Anglo-Saxon Jurisprudence as a common law concept used to mean a resolution, termination or finality of judgment, disposing of a legal proceeding.

A. A Dismissal With Prejudice Means There Has Been A Determination On The Merits And Is A Bar To Any Subsequent Prosecution For The Same Offense.

The judiciary, in pursuit of its supreme goal to provide for and encourage the just resolution of all legal proceedings has developed and prescribed the use of two different types of dismissals: "Dismissal With Prejudice" and "Dismissal Without Prejudice". (149 A.L.R. 553, 555) These two types of dismissals have two distinct purposes.

Dismissal Without Prejudice requires a discontinuance of a prosecution and indicates that the merits of the claim or cause of action have not been tried and allows the parties to litigate in a subsequent action. United States v. Pope, 574 F.2d 320, 327 (6th Cir. 1977).

Dismissal With Prejudice is the converse of the above phrase and requires the discontinuance of a prosecution while terminating the right of the prosecution to sue in the future for the same claim or cause of action of the dismissed action. (149 A.L.R. 553, 625) and thereafter bar future prosecution of the litigated issue, claim, cause of action, or alleged criminal conduct. United States v. Oppenheimer, 242 U.S. 85, 87, 37 S.Ct. 68, 69, 61 L.Ed. 161, 164 (1916); United States v. Cejas, 817 F. 2d 595, 601 (9th Cir. 1987); White v. United States, 377 F.2d 948, 949 (D.C. Cir. 1967); Mars v. McDougal, 40 F.2d 247, 249 (10th Cir. 1930).

The lack of a sound, predictable policy for finality of judgments is a dangerous erosion of the profoundly important protection against government prosecution. To allow the instant decision to stand removes the finality and certainty of a dismissal with prejudice.

B. If The Instant Decision Is Allowed To Stand It Will Reward The Government For Failing To Comply With The Law Of The Case.

The government failed to seek a rehearing or appeal the trial court's initial decision entered on July 1, 1986. Pursuant to 18 U.S.C. Section 3731, the government had thirty days to file its notice of appeal after the entry of the judgment dismissing the indictment with prejudice. The government's failure to appeal the initial judgment renders that decision by the trial court judge as the law of the case. See United States v. Houser, 804 F.2d 565, 567-569 (9th Cir. 1986); Hanna Boys Center v. Miller, 853 F.2d 682, 685-686 (9th Cir. 1988); also see 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure, Section 4478, p.788 (1981)

The government should not be allowed to avoid the requirements of the law of the case by attempting to bootstrap authority which applies to the original proceeding and not to the second proceeding. In other words, cases such as United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978); and United States v. Martin Linen Supply Company, 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977) are factually and legally distinguishable from the instant case. In both Scott, supra and Martin Linen Supply, supra, it was a direct appeal from the trial court's order and not from a subsequent proceeding as occurred in the instant matter. Additionally, in Scott, supra, the defendant moved to dismiss the case; whereas in the instant case the government moved to dismiss with prejudice. In Martin Linen Supply, supra, there was never a request for a dismissal with prejudice, again requested by the government and entered by the trial court.

Regardless of the label one places upon the Court's entry of the initial judgment, determination of the Judge's intent is not presently before this Court, nor the Courts below. As the government has not appealed the trial court's entry of the judgment dismissing with prejudice the entire indictment, all that is subject to review is the application of

the doctrines of res judicata and collateral estoppel as animated by the Fifth Amendment provisions against double jeopardy. Accordingly, neither United States v. Scott, supra nor United States v. Martin Linen Supply Company, supra are of any assistance in reaching the issue herein.

If this Court allows, as the lower Courts have, for the government to argue that these cases are controlling, then the government is being allowed to have an appeal without complying with the requirements of stare decisis and statutory law. If such a confusing precedent is allowed to remain, it is likely to generate even further confusion among Circuits, and within the Ninth Circuit itself. In fact, it would seem that the Ninth Circuit has created a new appellate period for government appeals. Clearly, 18 U.S.C. Section 3731 and other cases cited by this Court, including Serfass v. United States, 420 U.S. 377, 387, 95 S.Ct. 1055, 1061-62, 43 L.Ed.2d 265, 273 (1975) allow appeals from a dismissal in all cases where the Constitution permits. However, such appeals must be filed within thirty days from the entry of the judgment. The government's failure to timely file an appeal requires that the Court's judgment be given res judicata and collateral estoppel effect. The judgment of July 1, 1986 dismissing with prejudice the original indictment cannot be subject to further review.

### III

#### THE INSTANT DECISION CONFLICTS WITH OTHER DECISIONS AND CREATES CONFUSION AND UNCERTAINTY

##### A. The Instant Case Ignores And Conflicts With The Supreme Court Case of United States v. Oppenheimer.

The instant decision failed to follow the stare decisis of United States v. Oppenheimer, 242 U.S. 85, 87 S. Ct. 68, 61 L.Ed. 161 (1916). In United States v. Oppenheimer, Id.,

Justice Holmes held that a judgment dismissing an indictment on the ground that the criminal charge is barred by the statute of limitations is a bar, irrespective of any question of former jeopardy, to a second prosecution under a new indictment for the same offense. In Oppenheimer, supra, Justice Holmes rejected the government's argument that one had to have a factual determination by a trier of fact before jeopardy would attach. All that was required was a determination that there was an adjudication on the merits of the case. Oppenheimer, Id., at 87-88, 37 S. Ct. 68-69. It is submitted, that a dismissal with prejudice as in the instant case, is clearly of the same class or type of case as a dismissal for violation of the statute of limitations. Unfortunately, the lower court of appeal did not distinguish nor discuss the case of the United States v. Oppenheimer, supra when it rendered its decision.

B. The Court Of Appeal Failed To Address Or Distinguish The Conflict With The Instant Decision And Decisions In Its Own Circuit, Namely United States v. Cejas, And United States v. Hayden.

In United States v. Cejas, 817 F2d 595 (9th Cir. 1987) the Court of Appeals concluded that a Court could look at the four corners of a order dismissing an indictment and rely upon that order to grant another dismissal for the offenses charged in the preceding indictment. This was based upon the double jeopardy clause and the doctrines of res judicata and collateral estoppel. Cejas, supra at 597-601. In the instant case, the Court of Appeals did not even discuss, let alone distinguish, United States v. Cejas, supra from the instant determination.

The Appellate Court also failed to distinguish a second case from its own Circuit, United States v. Hayden,

860 F. 2d 1483, (9th Cir. 1988)<sup>2</sup>. In Hayden, the Ninth Circuit Court of Appeals held that there was a distinction between a dismissal pursuant to Rule 48(a) and Rule 48(b) of the Federal Rules of Criminal Procedure, and also found that if the government did not act in good faith in moving to dismiss an indictment, that the Court has the discretion to dismiss with prejudice if it makes the converse finding. The Appellate Court also noted in Hayden, Id. at 1485, that if a motion to dismiss with prejudice was granted that the government must request a rehearing or appeal the decision timely. It is submitted that the failure of the government to act would make the trial court's decision the law of the case.

The Castiglione Court failed to distinguish Hayden, supra from the instant matter. Although the Court, in a footnote in the amended opinion talked about the trial court's authority to dismiss with prejudice on a finding of prosecutorial bad faith, there is no analysis of how that case effects the instant matter. But again, it must be pointed out that Hayden, is a direct appeal of a dismissal with prejudice. It is not an indirect collateral attack brought by the government in trying to prevent the dismissal of a similar or identical charge contained in a superseding indictment. It is submitted, that the latter procedure would require a legal determination. It does not require any determination of a trial court's intent in dismissing with prejudice a pending indictment.

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<sup>2</sup>Interestingly, United States v. Hayden, supra, cites the case of United States v. Towill, 548 F.2d 1363 (9th Cir. 1977) which has a remarkably similar procedure as in the instant case. In Towill, supra, the Court of Appeals upheld the trial court's dismissal of a count with prejudice pursuant to 28 U.S.C. Federal Rules of Criminal Procedure Rule 48(b). It should be noted that Towill was a direct appeal by the government pursuant to 18 U.S.C. Section 3731. Id. at 1364-1366, 1368-1370.



It is submitted, that the dismissal with prejudice indicates that the government could not prove its case. The gravamen of this case is not "the label" placed on it by a higher Court's interpretation of a trial judge's intent, it is the effect of a dismissal with prejudice. When one traces the use of dismissal and its two separate meanings through our Anglo-Saxon jurisprudence, the conclusion is obvious. This case is over. Accordingly, applying the doctrines of res judicata and collateral estoppel through the provision of the Fifth Amendment prohibition against double jeopardy mandates that counts five through nine of the superseding indictment be dismissed.

### C. The Instant Decision Also Conflicts With Decisions Of Other Courts.

Review of this decision is required because the instant decision conflicts substantially with not only other appellate opinions but also precludes the application of a national uniform standard for cases which have been dismissed with prejudice. Clearly, other Appellate Courts have held that a dismissal with prejudice is a final adjudication on the merits and bars any further prosecution for the same offense. White v. United States, 377 F.2d 948 (D.C. Cir. 1967); United States v. Furey, 514 F.2d 1098 (2d Cir. 1975); and United States v. Derr, 726 F.2d 617 (10th Cir. 1984). Additionally, civil cases have come to the same conclusion dealing with the doctrine of res judicata. See Mars v. McDougal, 40 F.2d 247 (10th Cir. 1930); Hilbert v. Dooling, 476 F.2d 355 (2d Cir. 1973); Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 320, 326, [Fn.5], 99 S.Ct. 645, 649, 58 L.Ed.2d 552, 559 (1979); And Cromwell v. County of Sacramento, 94 U.S. 351, 352, 24 L.Ed. 195, 197-198 (1877).

The failure to grant review herein will create chaos and havoc when both criminal and civil courts dismiss cases with prejudice but then decide that does not mean what it says; nor does it mean what we all learned in law school; namely that the case is concluded. A dismissal with

prejudice should continue to consistently mean that no issue, merit, or cause of action, contained within the pleading, can ever be relitigated.

#### IV

### THE INSTANT CASE PRESENTS A NOVEL ISSUE AND REVIEW IS NECESSARY TO SECURE UNIFORM APPLICATION OF THE PRINCIPALS OF RES JUDICATA AND COLLATERAL ESTOPPEL AS ANIMATED BY THE DOUBLE JEOPARDY CLAUSE IN THE ADMINISTRATION OF JUSTICE

As the Appellate Court noted in both opinions, (see Appendix p.5a and p.11a), the instant case is a matter of first impression. There are no reported cases which deal with the effect of a dismissal with prejudice, when requested by the government. But see United States v. Towill, supra, 548 F.2d 1363 (9th Cir. 1977).

It is submitted, that this Court should grant review to preclude a piecemeal review of a trial court's orders. In addition, and perhaps most importantly, review should be granted to preclude a party from bootstrapping a failure to appeal an adverse judgment to avoid the legal effect of that final judgment on any other further pending pleadings. This appeal is not based, as suggested by the lower Courts, on the theory that the government can have more than one indictment pending; see United States v. Castiglione, Slip Op., App.p.11a (1989), citing United States v. Chenaar, 552 F.2d 294, 302 (9th Cir. 1977); nor is this appeal based on the theory that the government can have two indictments pending; Id. at 11a, citing United States v. Holm, 550 F.2d 568, 569, (9th Cir.) Cert. Denied 434 U.S. 856 (1977); nor an election by the government to proceed solely on a particular pending indictment. Id. at 11-12a, citing Thompson v. United States, 202 F. 401, 404 (9th Cir. 1913). The issue in this

case is whether the government has the right to dismiss with prejudice similar or identical counts in an original indictment, fails to seek a review of said dismissal and once it becomes final, maintain that such a dismissal has no legal consequence on those pending counts in the superseding indictment. It is more appropriate to determine whether or not our long history of the distinction between a dismissal with prejudice and a dismissal without prejudice will be blurred, thereby bringing about uncertainty as to the finality of such dismissals in this most important area of the law.

### CONCLUSION

For these various reasons, it is submitted that the Petition for Writ of Certiorari should be granted. The principals of res judicata and collateral estoppel as animated by a defendant's fundamental constitutional protection against double jeopardy requires this Honorable Court to grant the instant petition. Failure to grant the instant petition will create confusion, conflict, and the danger that our judicial system could disintegrate. If there is no finality in the dismissing with prejudice of a lawsuit, whether criminal or civil, there is no way to conclude a case other than having a jury or court trial. Clearly, that was not the intent of our forefathers, nor the intent of the numerous authorities cited herein.

Respectfully submitted,

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## APPENDIX



- FOR PUBLICATION

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

PHILLIP RANDY CASTIGLIONE,  
*Defendant-Appellant.*

No. 87-1226

D.C. No.  
CR 85-0082-1-EDP

OPINION

Appeal from the United States District Court  
for the Eastern District of California  
Edward D. Price, District Judge, Presiding

Argued and Submitted  
April 11, 1988—San Francisco, California

Filed October 28, 1988

Before: Otto R. Skopil, Jr. and Edward Leavy\*, Circuit  
Judges and James H. Burns\*\*, District Judge.

Opinion by Judge Leavy

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\*Judge Leavy was drawn to replace Judge Anderson, now deceased. He has read the briefs, reviewed the record, and listened to the tape of oral argument held April 11, 1988.

\*\*Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

**SUMMARY**

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**Criminal Procedure**

The court affirmed a denial of a motion dismissing five counts of a superseding indictment, holding that the dismissal of an original indictment with prejudice does not bar prosecution on identical counts in a superseding indictment.

After the return of a superseding indictment, the court granted the government's motion to dismiss the original indictment with prejudice. Appellant Phillip Randy Castiglione moved to dismiss five counts of the superseding indictment, claiming that the dismissal was a final adjudication barring reprosecution.

[1] Whatever its label, a judge's ruling does not bar further prosecution if it does not represent a resolution in favor of the defendant on some or all of the factual elements of the offense charged.

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**COUNSEL**

David R. Mugridge, Nuttall, Berman & Magill, Fresno, California, for the defendant-appellant.

Gail Brodfuehrer, Assistant Attorney General, Tax Division, Washington, D.C., for the plaintiff-appellee.

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**OPINION**

LEAVY, Circuit Judge:

Phillip Randy Castiglione appeals the district court's denial of his motion to dismiss Counts Five through Nine of

a superseding indictment. Castiglione contends that the Double Jeopardy Clause applies because the original indictment was dismissed with prejudice and Counts Five through Nine of the superseding indictment are identical to certain counts charged in it. The original indictment was still pending when the superseding indictment was returned.

We affirm.

### FACTS AND PRIOR PROCEEDINGS

On June 15, 1985, a 121-count indictment was filed against Castiglione, Dadian, and Guerriero. In May 1986 the government filed a motion to dismiss all but twenty-nine counts, without prejudice. In June 1986, after re-interviewing a witness, the government filed an amended motion to dismiss the entire indictment, without prejudice. At the hearing on this motion, the government informed the court that a superseding indictment, which would contain several counts similar to those in the original indictment as well as additional counts, would follow. The trial judge stated that no counts of the original indictment would be dismissed without prejudice and that the case would proceed to trial unless a superseding indictment was filed before the scheduled trial date. The trial judge further stated that upon filing of a superseding indictment, he would dismiss the existing indictment with prejudice sua sponte.

The grand jury returned a superseding indictment and Castiglione was arraigned on it. The government moved to dismiss the original indictment without prejudice. In response, the trial judge indicated he would not dismiss without prejudice, and unless the government moved to dismiss with prejudice, trial on the original indictment would be set. Consequently, the government moved that the original indictment be dismissed with prejudice. The trial judge granted the motion.

Castiglione then filed a motion to dismiss Counts Five through Nine of the superseding indictment on the ground of *res judicata*, arguing that since those counts were identical to counts contained in the original indictment, the dismissal with prejudice constituted a final adjudication barring re prosecution. After a hearing, Castiglione's motion was denied. His motion for reconsideration was also denied. Castiglione timely appeals.

## STANDARD OF REVIEW

The district court's order denying dismissal of an indictment on double jeopardy grounds is a question of law we review *de novo*. See *United States v. Schwartz*, 785 F.2d 673, 676 (9th Cir.), *cert. denied*, 107 S.Ct. 290 (1986).

## DISCUSSION

### I. Finality

The government contends we lack appellate jurisdiction because the district court's denial of Castiglione's motion to dismiss was not a final order. The government's contention lacks merit. The "final judgment rule" of 28 U.S.C. § 1291 is subject to the collateral order exception of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Supreme Court discussed the *Cohen* holding in *Abney v. United States*, 431 U.S. 651, 658 (1977), and held that "pretrial orders rejecting claims of former jeopardy . . . constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of § 1291." *Id.* at 662 (footnote omitted); *United States v. Baptiste*, 832 F.2d 1173, 1174 n.1 (9th Cir. 1987) (a district court's order remanding a case for retrial is not "final," but rather falls within the *Cohen* "collateral order" exception because it constitutes a final rejection of the defendant's double jeopardy claim and is collateral to the principal issue of guilt); accord *United States v. Cejas*, 817 F.2d 595, 596 (9th Cir. 1987). The district court's order denying Castiglione's

motion to dismiss the indictment falls within the collateral order exception, giving this court jurisdiction over the appeal.

## II. Colorable Claim

The government contends we lack appellate jurisdiction because Castiglione has not raised a colorable claim. That contention lacks merit. The government is correct in contending that a double jeopardy claim is not appealable unless it is colorable. *Richardson v. United States*, 468 U.S. 317, 322 (1984), citing *United States v. MacDonald*, 435 U.S. 850, 862 (1978). Castiglione, however, has raised a colorable claim by his argument that dismissal of the indictment with prejudice constitutes a final decision on the merits that bars further prosecution. Therefore, we have jurisdiction over this appeal.

## III. Denial of Motion to Dismiss

It is the effect of the dismissal of the original indictment with prejudice upon the identical counts in the pending superseding indictment that is at issue in this appeal. This is a matter of first impression.

[1] The trial judge dismissed the original indictment with the knowledge that a superseding indictment was pending, then denied the motion to dismiss those counts of the superseding indictment identical to certain counts in the original indictment. Although the trial judge used the words "with prejudice," he did not intend the dismissal to bar prosecution on any charges contained in the pending superseding indictment. Whatever its label, a judge's ruling does not bar further prosecution if it does not represent a resolution in favor of the defendant on some or all of the factual elements of the offense charged. *United States v. Scott*, 437 U.S. 82, 97 (1978), citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). We conclude that the dismissal here of the original

indictment with prejudice does not bar further prosecution on identical counts in the superseding indictment.

AFFIRMED.



**FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

<p>UNITED STATES OF AMERICA, <i>Plaintiff-Appellee,</i></p> <p style="text-align:center">v.</p> <p>PHILLIP RANDY CASTIGLIONE, <i>Defendant-Appellant.</i></p>	}	<p>No. 87-1226</p> <p>D.C. No. CR 85-0082-1-EDP</p> <p>AMENDED OPINION</p>
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Appeal from the United States District Court  
for the Eastern District of California  
Edward D. Price, District Judge, Presiding

Argued and Submitted  
April 11, 1988—San Francisco, California

Filed October 28, 1988  
Amended May 23, 1989

Before: Otto R. Skopil, Jr. and Edward Leavy\*, Circuit  
Judges, and James M. Burns\*\*, District Judge.

Opinion by Judge Leavy

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\*Judge Leavy was drawn to replace Judge Anderson, now deceased. He has read the briefs, reviewed the record, and listened to the tape of oral argument held April 11, 1988.

\*\*Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

**SUMMARY**

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**Criminal Procedure**

The court of appeals affirmed, holding that the dismissal of an original indictment with prejudice did not bar further prosecution on identical counts in a superseding indictment.

Appellant Phillip Randy Castiglione was charged in an indictment. The government subsequently moved to dismiss the indictment without prejudice, informing the district court that a superseding indictment, which contained several counts similar to those in the original indictment, would follow. After the grand jury returned a superseding indictment, the district court dismissed the original indictment with prejudice. Castiglione then moved to dismiss counts in the superseding indictment that were identical to counts contained in the original indictment. The district court denied the motion.

[1] Although the district judge used the words "with prejudice" when he dismissed the original indictment, he did not intend the dismissal to bar prosecution on any charges in the pending superseding indictment. A judge's ruling does not bar further prosecution if it does not represent a resolution in favor of the defendant on some or all of the factual elements of the offense charged. Consequently, prosecution on the superseding indictment was not barred in this case.

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**COUNSEL**

David R. Emerich, Jackson, Hargrove, Hillison & Emerich, and Timothy V. Magill and David R. Mugridge, Nuttall, Berman & Magill, Fresno, California, for the defendant-appellant.

Gail Brodfuehrer, Assistant Attorney General, Tax Division, Washington, D.C., for the plaintiff-appellee.

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OPINION

LEAVY, Circuit Judge:

Phillip Randy Castiglione appeals the district court's denial of his motion to dismiss Counts Five through Nine of a superseding indictment. Castiglione contends that the Double Jeopardy Clause applies because the original indictment was dismissed with prejudice and Counts Five through Nine of the superseding indictment are identical to certain counts charged in it. The original indictment was still pending when the superseding indictment was returned.

We affirm.

## FACTS AND PRIOR PROCEEDINGS

On June 15, 1985, a 121-count indictment was filed against Castiglione, Dadian, and Guerriero. In May 1986 the government filed a motion to dismiss all but twenty-nine counts, without prejudice. In June 1986, after re-interviewing a witness, the government filed an amended motion to dismiss the entire indictment, without prejudice. At the hearing on this motion, the government informed the court that a superseding indictment, which would contain several counts similar to those in the original indictment as well as additional counts, would follow. The trial judge stated that no counts of the original indictment would be dismissed without prejudice and that the case would proceed to trial unless a superseding indictment was filed before the scheduled trial date. The trial judge further stated that upon filing of a superseding indictment, he would dismiss the existing indictment with prejudice sua sponte.

The grand jury returned a superseding indictment and Castiglione was arraigned on it. The government moved to dismiss the original indictment without prejudice. In response, the trial judge indicated he would not dismiss with-

out prejudice, and unless the government moved to dismiss with prejudice, trial on the original indictment would be set. Consequently, the government moved that the original indictment be dismissed with prejudice. The trial judge granted the motion.

Castiglione then filed a motion to dismiss Counts Five through Nine of the superseding indictment on the ground of *res judicata*, arguing that since those counts were identical to counts contained in the original indictment, the dismissal with prejudice constituted a final adjudication barring reprosecution. After a hearing, Castiglione's motion was denied. His motion for reconsideration was also denied. Castiglione timely appeals.

## STANDARD OF REVIEW

The district court's order denying dismissal of an indictment on double jeopardy grounds is a question of law we review *de novo*. See *United States v. Schwartz*, 785 F.2d 673, 676 (9th Cir.), *cert. denied*, 107 S.Ct. 290 (1986).

## DISCUSSION

### I. Finality

The government contends we lack appellate jurisdiction because the district court's denial of Castiglione's motion to dismiss was not a final order. The government's contention lacks merit. The "final judgment rule" of 28 U.S.C. § 1291 is subject to the collateral order exception of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Supreme Court discussed the *Cohen* holding in *Abney v. United States*, 431 U.S. 651, 658 (1977), and held that "pretrial orders rejecting claims of former jeopardy . . . constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of § 1291." *Id.* at 662 (footnote omitted); *United States v. Baptiste*, 832 F.2d 1173, 1174 n.1 (9th Cir. 1987) (a district court's

order remanding a case for retrial is not "final," but rather falls within the *Cohen* "collateral order" exception because it constitutes a final rejection of the defendant's double jeopardy claim and is collateral to the principal issue of guilt); accord *United States v. Cejas*, 817 F.2d 595, 596 (9th Cir. 1987). The district court's order denying Castiglione's motion to dismiss the indictment falls within the collateral order exception, giving this court jurisdiction over the appeal.

## II. Colorable Claim

The government contends we lack appellate jurisdiction because Castiglione has not raised a colorable claim. That contention lacks merit. The government is correct in contending that a double jeopardy claim is not appealable unless it is colorable. *Richardson v. United States*, 468 U.S. 317, 322 (1984), citing *United States v. MacDonald*, 435 U.S. 850, 862 (1978). Castiglione, however, has raised a colorable claim by his argument that dismissal of the indictment with prejudice constitutes a final decision on the merits that bars further prosecution. Therefore, we have jurisdiction over this appeal.

## III. Denial of Motion to Dismiss

It is the effect of the dismissal of the original indictment with prejudice upon the identical counts in the pending superseding indictment that is at issue in this appeal. This is a matter of first impression.

[1] The trial judge dismissed the original indictment with prejudice only after the government had filed the superseding indictment. While the government may file a superseding indictment prior to trial, see *United States v. Chenaar*, 552 F.2d 294, 302 (9th Cir. 1977), and it may have two indictments outstanding absent prejudice to the accused, see *United States v. Holm*, 550 F.2d 568, 569 (9th Cir.), cert. denied, 434 U.S. 856 (1977), it was appropriate for the government to

elect to proceed solely under the superseding indictment, *see Thompson v. United States*, 202 F. 401, 404 (9th Cir. 1913). Thereafter, the trial judge denied Castiglione's motion to dismiss those counts of the superseding indictment identical to certain counts in the original indictment. Although the trial judge used the words "with prejudice," he did not intend the dismissal to bar prosecution on any charges contained in the pending superseding indictment. A judge's ruling does not bar further prosecution if it does not represent a resolution in favor of the defendant on some or all of the factual elements of the offense charged.<sup>1</sup> *United States v. Scott*, 437 U.S. 82, 97 (1978), *citing United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). We conclude that the dismissal here of the original indictment with prejudice does not bar further prosecution on identical counts in the superseding indictment.

AFFIRMED.

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<sup>1</sup>In limited circumstances, a dismissal with prejudice bars further prosecution although it does not resolve disputed factual elements. For instance, a district court may dismiss an indictment with prejudice pursuant to Fed. R. Crim. P. 48(b), where the government has unnecessarily delayed in bringing a defendant to trial. *See United States v. Hayden*, 860 F.2d 1483, 1487-89 (9th Cir. 1988).

## CERTIFICATE OF SERVICE

I, TIMOTHY V. MAGILL, a member of the Bar of this Court, hereby certify that on this 20 day of July, 1989, one copy of the Petition for Writ of Certiorari in the above-entitled case was mailed, first class postage prepaid, to:

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U. S. District Court for the Eastern District  
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for all the respondents herein. I further certify that all parties required to be served have been served.

---

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